No. 94-329

FOR ARGUMENT

FILED

JAN 17 1995

OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1994

Rosenberger, et al.,
Petitioners,

v.

Rector and Visitors of University of Virginia,
Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF *AMICUS* 1

ISSUE PRESENTED FOR REVIEW 2

ARGUMENT 3

I. Introduction. 3

II. Schools should be allowed to restrict their financial support and sponsorship to activities which promote their educational mission. The support of one set of student activities does not implicate a free speech right to receive support for other student activities. 3

A. The aid at issue here is by government designation a restricted benefit and therefore no free speech rights should attach 3

B. Schools may restrict use of their facilities for specific purposes, even where the question of sponsorship or funding is not an issue 15

C. The unique mission of educational institutions, particularly those at the elementary and secondary level, requires flexibility to determine what activities to sponsor and to fund 20

CONCLUSION. 21

TABLE OF AUTHORITIES

Page

CASES:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 13

Bethel v. School District No. 403 v. Fraser, 478 U.S. 675 (1986). 20

FCC v. League of Women Voters, 468 U.S. 364 (1984). 9

Harris v. McRae, 448 U.S. 297 (1980) 11

Hazelwood School District v. Kuhlmeier, 484 U.S. 267 (1988). 5,20

Lamb's Chapel v. Center Moriches School District, 113 S.Ct. 2141 (1993). 6,15,16,17

Maher v. Roe, 432 U.S. 464 (1977). 8

Perry v. Sinderman, 408 U.S 593 (1972). 9,10,12

Regan v. Taxation With Representation, 461 U.S. 540 (1983) 7

Rosenberger v. Rector and Visitors of University of Virginia, 18 F.3d 269

(4th Cir. 1994) 15

Rust v. Sullivan,
111 S.Ct. 1759 (1991) 8

Sherbet v. Verner, 374
U.S. 398 (1963) 10

*Tinker v. Des Moines
Independent Community
School District*, 393 U.S.
503 (1969). 11,20

*Webster v. Reproductive
Health Services*, 492
U.S. 490 (1989) 8

*Westside Community School
Board v. Mergens*, 496
U.S. 226 (1990) 18

Widmar v. Vincent, 454
U.S. 263 (1981) 6,17

STATUTES:

Equal Access Act, 20 U.S.C.
§§ 4071-4074 (1990) 18

Public Health Service
Act, 42 U.S.C.
§§ 300a-300a-6 (1991) 9

OTHER AUTHORITIES:

Tribe, L., *American Constitutional
Law* 782 (2d ed. 1988) 8

No. 94-329

In the

Supreme Court of the United States

October Term, 1994

Rosenberger, et al.,
Petitioners,

v.

Rector and Visitors of University of
Virginia,
Respondents.

BRIEF *AMICUS CURIAE* OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF RESPONDENTS

This brief is filed with consent of both parties. Agreement of consent is on file with the Clerk of this Court.

INTEREST OF *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the

boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

This case concerns school districts in perhaps a more vital way than colleges and universities because the educational mission of public schools depends on the flexibility to decide which activities should be supported and sponsored by the school as consistent with their educational mission and which should not. The interpretation of the free speech clause by the court below seriously erodes that flexibility.

ISSUE PRESENTED FOR REVIEW

Whether the free speech clause of the First Amendment requires a public university

or school to fund all student speech if it funds any.

ARGUMENT

I. Introduction.

Amicus agrees with the lower court's analysis of the establishment clause, but submits that the analysis was unnecessary because no duty existed under the free speech clause requiring the University to fund Petitioners' publication.

Amicus submits that the Fourth Circuit's finding regarding the application of the free speech clause in this case should be overturned, thus precluding the need to decide the establishment clause issue.

II. Schools should be allowed to restrict their financial support and sponsorship to activities which promote their educational mission. The support of one set of student activities does not implicate a free speech right to receive support for other student activities.

A. The aid at issue here is by government designation a restricted benefit, and therefore, no free speech rights should attach.

The aid at issue here is not general aid for one purpose (*e.g.*, government employment) conditioned on the relinquishing of a constitutional right (*e.g.*, right to speak on matters of public concern). This case involves financial assistance supporting speech itself. The government does not require the petitioners to relinquish their right to speak; nor are they entitled to receive the government assistance unless their activity meets the eligibility criteria of the funding program.

The University's decision to establish eligibility criteria for the receipt of funds directly in support of speech can be analogized to the government's decision to designate use in "limited public forum" cases. "Limited public forum" analysis may be applied in cases where the government has elected to open an otherwise closed forum (or its purse) for public discourse even though it had the option of restricting speech on the basis of

content. This contrasts with traditionally public forums, such as public parks, where the government can limit speech based only on "time, place and manner." In "limited public forum" cases, the Court looks first at the nature of the "forum," *i.e.*, the parameters of use set by the government and, second, the particular speech in question and whether it fits into those parameters. For example, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 267 (1988), this Court held that students do not have a free speech right in their articles written for a school sponsored newspaper.

> [W]e conclude that the standard articulated in *Tinker* [*infra*] for determining when a school may punish student expression need not also be the standard for determining when a school may refuse dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 272.

Similarly, schools should not be forced to sponsor organizations or to financially support the activities of organizations that do not conform to the educational mission of the school. Just as the Hazelwood school district cannot be forced to sponsor student speech through its own newspaper, the University of Virginia cannot be forced to sponsor student speech by financing a student publication.

This case differs from *Widmar v. Vincent*, 454 U.S. 263 (1981), where a school opened its facilities for general use by the student body and thus was precluded from denying access to a religious group based on the content of speech. Similarly, this is not a viewpoint discrimination case like *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. 2141 (1993), where a school opened its facilities for discussion of family values but precluded the plaintiffs from discussing the subject

from a Christian perspective, although *amicus* submits that a school could restrict its financial largess to a particular viewpoint.

The government's use of content-related distinctions as a basis for determining whether to support a particular group or activity was upheld by this Court in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). In *Regan* this Court held that the federal government may provide a tax exemption solely for groups that lobby on behalf of veterans' interests, while denying such an exemption to other organizations devoted to activities protected by the First Amendment. The Court rejected the notion that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech." *Id.* at 548. Rather, in the benefit context, the only inquiry is whether the distinction has a rational basis, it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by

charities generally, it will subsidize lobbying by veterans' organizations." *Id.* at 550. *See also Maher v. Roe*, 432 U.S. 464, 475 (1977); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

This Court's jurisprudence in other cases also supports the University's decision not to subsidize petitioner's speech.

> [T]he fact that government *may not penalize* exercise of a right by withholding an otherwise discretionary benefit does not imply that government *must subsidize exercise* of the right. Thus, although *Planned Parenthood* [*Babbitt v.*, 107 S.Ct. 391 (1986)] makes it clear that those who undergo, perform, or counsel abortion may not be required to cease those activities as a condition of receiving public funding for their other activities, it certainly does not follow that government must pay for abortions or abortion counseling.

L. Tribe, *American Constitutional Law* 782 (2d ed. 1988).

In *Rust v. Sullivan*, 111 S.Ct. 1759 (1991), this Court upheld a restriction in regulations of the Department of Health and

Human Services under Title X of the Public Health Service Act prohibiting use of family planning funds appropriated under the Act for abortion counseling. The Court distinguished *Perry v. Sinderman*, 408 U.S. 593 (1972), and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), cases on which the Fourth Circuit relied here:

> [T]he Government here is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. . .In contrast, our "unconstitutional conditions" cases involve situations in which the government has placed a condition on the *recipient* of the subsidy rather that [sic] on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

111 S.Ct. at 1774.

The circumstances in this case are vastly different from the so-called "government-generated benefits" cases cited by the Fourth Circuit. In those cases the government attempted to deny some general aid such as

government employment in *Perry v. Sinderman*, 408 U.S. 593 (1972), and government unemployment benefits in *Sherbet v. Verner*, 374 U.S. 398 (1963), on the basis of some unconnected speech or activity occurring outside the scope of the benefit program. In the instant case, the University has placed no prohibition on the Petitioner's protected free speech rights. Petitioners are permitted to use University facilities, they have access to University printing equipment and they are permitted to distribute their materials on campus. The University has simply declined to provide funding from a limited student activities fund for the students' religious publication. Unlike the cases cited by Petitioners, the University's refusal to subsidize religious, political and social speech and activities is based upon a legitimate relationship between the funding decision and the benefit at issue.

In *Harris v. McRae*, 448 U.S. 297, 318 (1980), this Court held that the Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of [a constitutional] freedom." In that case the Court upheld a provision in the Social Security Act restricting funding of abortions.

> It cannot be that because government may not prohibit the use of contraceptives, *Griswold v. Connecticut*, [citation omitted], or prevent parents from sending their child to a private school, *Pierce v. Society of Sisters*, [citation omitted], government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

448 U.S. at 318 (1980).

Likewise, the fact that a school cannot prohibit a student from wearing an armband in protest of the Viet Nam War, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), does not mean that the school must fund a newspaper advocating or

protesting this country's presence in Viet Nam. While a public employee cannot be penalized for publicly criticizing the university administration, *Perry v. Sinderman*, the university cannot be required to fund the criticism.

Schools should be allowed to make educational determinations as to which of many competing educational activities to fund. It is not unusual at the elementary and secondary level, for example, for schools both to restrict facilities and decline to sponsor organizations that are not related to their educational mission. It cannot be the law of the land that schools are required to sponsor through faculty advice and participation, through funding or otherwise, partisan political groups, hate groups like the Ku Klux Klan or controversial groups such as those espousing right to life and pro-choice. The nature of the parameters of the forum will establish whether a particular group must be

allowed to *meet* on school grounds. But there is no requirement that the school *sponsor* a group merely because it sponsors other groups. Similarly, the free speech clause does not require that the school provide funding to a group merely because it funds another group.

It is also important to note that because the University requires all students to contribute to the student activities fund, the school has an ethical, if not legal, obligation to support only those activities which fit into the educational mission of the school. In *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977), this Court held that an "agency shop" arrangement where the employer deducts a "service fee" from the salaries of nonmember teachers equivalent to the amount of the union dues does not violate the First Amendment to the extent the fees are used for collective bargaining, contract administration and grievance adjustments purposes but are unconstitutional to the extent the fee is used

for ideological causes not related to collective bargaining. Similarly, in the case at bar it is appropriate that the University decided that the limited funds in the student activities account should not be used for ideological causes such as political and religious speech or for social activities and, instead, should be reserved for educational matters. Certainly, political or religious subjects may be appropriate subjects to teach *about* in a political science or religion course, but a school teaching about religion or politics is far different from requiring a school to finance partisan political speech or sectarian religious speech.

It is interesting to note that the Fourth Circuit in its discussion of the establishment of religion issue pointed out that by funding Petitioners' publication, the University would indicate that it is promoting the message in the publication.

> **Because *Wide Awake* is a journal pervasively devoted to the discussion and advancement of an avowedly Christian theological and personal philosophy, for the University to subsidize the publication would, we believe, send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values.**

18 F.3d 269, 286 (4th Cir. 1994).

The court may or may not be correct in its conclusion that such a signal is sufficient to establish religion, but it is certainly sufficient reason to justify, under the free speech clause, the University's decision not to fund the activities.

B. Schools may restrict use of their facilities for specific purposes, even where the question of sponsorship or funding is not an issue.

Lamb's Chapel, 113 S.Ct. 2141 (1992), presented two issues: first, whether school districts may restrict the use of their facilities on the basis of subject matter; and second, once the facilities are opened for discussions on a particular subject, whether

they may limit discussion to a particular viewpoint. This Court answered the first question "yes" and the second one "no."

In *Lamb's Chapel*, a religious organization sought to use school facilities to show a film on family values "from a religious perspective." Since the district allowed other organizations to address that subject, the Court held that it could not discriminate against Lamb's Chapel because of its religious viewpoint. The group also contended that the district engaged in forbidden subject matter discrimination because it "opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional restrictions in traditional public fora, such as parks and sidewalks." 113 S.Ct. at 2146. Because the Court based its decision on viewpoint discrimination, it did not address that issue. However, it did

note: "There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. [Citations omitted.]" *Id.*

The Fourth Circuit's decision held that the University's refusal to fund Petitioner's publication discriminated on the basis of content rather than viewpoint. But, this Court has held that a public entity is entitled to discriminate on the basis of content in deciding whether to open its otherwise closed forum, although arguably if the number of subjects is broad enough, courts may be called upon to determine whether the school's limited public forum argument is a subterfuge. Thus, were this a facilities case like *Lamb's Chapel*, the court would have to make a finding of fact on the question of whether the facilities are "open." Of course, in the instant case the University, like the university in *Widmar v. Vincent*, has no

subject matter restriction on use of its facilities, the only restriction is that the membership of the group be limited to students. All student organizations, including Petitioners, are allowed to meet.

In *Westside Community School Board v. Mergens*, 496 U.S. 226 (1990), this Court ruled that under the Equal Access Act, 20 U.S.C. 4071, a secondary school must allow all groups to meet on school grounds if it operates a "limited open forum," defined as one in which one or more "non curriculum-related" groups are allowed to meet. The Court in *Mergens* interpreted the phrase "curriculum related" narrowly so as to include only those groups concerned with subjects covered by or required for a course or for which extra credit is given. However, the Court stated that the Act's definition of "limited open forum" is not necessarily coextensive with the free speech clause. Thus, under the free speech clause a school would not turn its facilities

into an "open forum" for the broad use of all students merely because it opened it to clubs which further the educational mission of the school, even though the subjects of the clubs are not offered in a course.

Furthermore, and more in line with the facts in this case, even where the school allows a broad range of clubs to meet on school grounds, the school still retains the option to *sponsor* only those clubs that relate to the educational mission of the school. It would be totally inappropriate to require a school to either sponsor no clubs or to sponsor all. The school may be required because of the nature of its forum to open its facilities to student groups like the Ku Klux Klan, the Young Democrats, the Young Republicans and the Young Moonies, but it is totally inappropriate to require the school to *sponsor* the organizations, provide faculty advisers (as opposed to mere monitors) and, in effect, *endorse* the philosophy of the clubs.

Yet that would be the result if the Fourth Circuit's decision on free speech in this case is allowed to stand.

C. The unique mission of educational institutions, particularly those at the elementary and secondary level, requires flexibility to determine what activities to sponsor and to fund.

This Court has consistently held that students' rights in the context of the public schools "are not automatically coextensive with the rights of adults in other settings." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 506. A school need not tolerate speech which is "inconsistent with its educational mission," *Fraser*, 478 U.S. at 685, "even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266.

These cases are instructive because they illustrate the importance of local educational

decision-making and the crucial difference between merely accommodating the speech of all students in the context of a forum open to all students or the speech of individual students in the *Tinker* context, and sponsoring the speech. The former is required and the latter is not.

CONCLUSION

Amicus submits that the Fourth Circuit's decision should be affirmed but not for the reasons stated in its opinion. No free speech rights were implicated in this case and,

therefore, the University may constitutionally decline to fund Petitioners' publication.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director